

Labor Gains

Reforming employment law

By Michael McMenamin

Advice to the new Congress on labor law reform: Be bold. Empower individual employees. Don't be co-opted by the Chamber of Commerce. Eliminate entrenched privileges. Don't compromise with organized labor.

Above all, don't be intimidated by the alphabet soup created during the past 60 years of increasing government regulation of the employment relationship—NLRB, FLSA, OSHA, EEOC, OFCC, ADEA, ADA, FMLA, etc. You don't have to dismantle, brick by brick, six decades of federal employment legislation. And you shouldn't try. If you do, the Democrats will beat you over the head with anti-employee labels while they continue to take hard and soft campaign contributions from organized labor.

Rather, consider three simple reforms which, taken together, will be revolutionary in their impact on the American workplace.

1) Abolish the Davis-Bacon Act.

2) Eliminate the National Labor Relations Board's restrictions on employee-involvement committees in the workplace.

3) Require all employment disputes involving federal law to be handled by neutral third-party arbitration under the Federal Arbitration Act.

These three reforms will:

* Decrease government spending by many billions of dollars at federal, state, and local levels;

* increase meaningful employment opportunities at entry level and more skilled positions for inner-city and other disadvantaged youths;

* increase U.S. productivity by encouraging more individual employee initiative and involvement in the workplace;

* dramatically decrease litigation expense for employment-related disputes;

* reduce the total number of government employees, especially at the federal level;

* create more effective protection for individuals against wrongful termination without cause;

* decrease job opportunities for lawyers while actively encouraging the use of lay persons in employment dispute resolution.

All this can be accomplished in the legislative equivalent of an afternoon, i.e., before the fall of 1995, when the presidential campaign commences in earnest. I have consciously left out, for political reasons, abolishing or reducing the minimum wage. I know there are excellent economic reasons for eliminating it. I know that it disproportionately hurts the poor and black inner-city youths. But until the Congressional Black Caucus has the political courage to endorse the concept, no responsible Republican who wants to recapture the African-American vote that belonged to the party from the Civil War through the 1920s should touch it. Never mind that the minimum wage has been racist in its impact since the 1950s; it wasn't conceived in racism, merely ignorance and 1930s populism. All of which leads to:

Reform #1: Abolish the Davis-Bacon Act. Unlike the minimum wage, Davis-Bacon has racism at its ugly little heart. It was conceived in 1931 in response to an Alabama contractor winning the bid for a veterans' hospital in Long Island using black labor who had been shut out of New York's lily-white construction trade unions. Aided by southern Democrats denouncing "cheap colored labor," Herbert Hoover, his generation's George Bush, signed the law in March 1931, turning his back on the black voters who had supported his party since Reconstruction.

Davis-Bacon and its progeny require that any construction project that receives federal funds must be paid the local "prevailing wage," which generations of Department of Labor bureaucrats have interpreted to mean the prevailing union wage in a given area, even if the percentage of union workers is only 50 percent. Gene Methvin, Washington editor of *Reader's Digest*, reports in a recent article that the federal government could save more than \$3 billion in construction costs in the next few years by repealing Davis-Bacon. In Philadelphia, for example, electricians are paid nearly \$38 an hour on federal projects, while private contractors pay slightly less than \$16 an hour. In Oakland, California, carpenters receive \$28 an hour on federal projects versus \$15 an hour on private projects.

Methvin quotes Thomas Henry Massaro, a third-generation union mason and former housing director in Newark and Philadelphia: "We could rehabilitate three or four times as many houses for the same money and put many more people to work if we just rid ourselves of Davis-Bacon."

Art Pearson, an African-American electrical and general contractor in Tacoma, Washington, says, "I could put two or three people to work for every Davis-Bacon wage employee." Paul King, head of UBM Inc., the largest minority-owned construction business in Illinois, also urges outright repeal of the law: "The black private sector could be the catalyst for real change."

Finally, Methvin quotes John Cruse, an African-American contractor in Boston, who no longer bids on low-income federal housing work because local union practices allow him to employ only one apprentice for every five journeymen: "That prohibits us from training our neediest inner city youth....[H]ow can we talk about reducing unemployment, crime, and drugs and moving people off welfare and not give those living in the inner city the opportunity to work in their own community?"

Remember these voices. Don't settle for half a loaf. Ignore the bill by Senator Larry Craig (R-Idaho) to raise the exemption on Davis-Bacon projects from its current minimum of \$2,000 to \$500,000. Listen to Art Pearson, Paul King, John Cruse, and other successful African-American businessmen, and repeal Davis-Bacon outright.

Reform #2: Eliminate the National Labor Relations Board's restrictions on employee-involvement committees in the workplace. The second reform is also aimed at entrenched union privileges, and like the first reform, will empower individual employees and, quite possibly, improve productivity. How? Eliminate Section 8(a)(2) of the National Labor Relations Act. Section 8(a)(2) makes it illegal for a company to

“dominate or interfere” with any “labor organization” or contribute financial or other support to it. It was intended, back in the 1930s, to prohibit the formation of company unions. It has long since outlived any usefulness it once had.

The main problem with Section 8(a)(2) today is that the members of the NLRB appointed by George Bush and the guy who succeeded him, are using Section 8(a)(2) in both unforeseen and unintended ways. Specifically, those who favor an adversarial model for labor relations—and here I include trade unions, all current NLRB members, and most Democrats—are using Section 8(a)(2) as their weapon of choice to discourage and inhibit the formation of employee-involvement/employee-participation committees designed to improve productivity and enhance product quality.

The purpose of the employee-involvement movement is to give all employees at all levels of a company a greater voice in improving company operations. Companies do this to make themselves more competitive, but major beneficiaries also include the employees themselves who, because of this organizational restructuring, find greater fulfillment in their jobs and greater control over the content of their jobs.

In a series of recent decisions commencing in the early 1990s with *Electromation* and *duPont*, the NLRB has vetoed the use of such employee-involvement structures. It does this by broadly defining “labor organization” as being any employee structure created by companies to seek greater employee input into job functions and productivity. After all, the employee performing a particular job function is in the best position, if his opinions are listened to, to offer advice on how to improve performance. Any input like this invariably involves “working conditions,” which makes any company-initiated employee structure that deals with this a “labor organization” unlawfully “dominated” under Section 8(a)(2).

Apologists for the NLRB have claimed that *Electromation* and *duPont* are atypical and do not undercut the employee-involvement movement. In *Electromation*, employee-involvement committees were challenged in the context of a union organization campaign, while *duPont* involved health and safety committees created without the consent of an existing union. The fact is, however, that the NLRB and its union supporters are trying, in *Electromation* and its progeny, to perpetuate an adversarial relationship in the workplace. The politically correct response to their denials is, “They’re lying through their teeth.”

Anything that empowers individual employees is a setback for organized labor and, by definition, the employees of the NLRB, whose jobs depend upon the continued existence of organized labor. Yet the decline of organized labor continues unabated from its high point of 35 percent of the private workforce in 1951 to barely 10 percent today. If present trends continue, it will be closer to 5 percent by the year 2000, a 20th-century low.

As with Davis-Bacon, don’t “clarify” or “modernize” this law by legislatively repealing *Electromation*. That is the intent of legislation introduced by Sen. Nancy Kassebaum (R-Kan.) and Rep. Steve Gunderson (R-Wis.). Their legislation is well meaning and certainly pro-employee-involvement. But it is a product of minority thinking—compromise and accommodation. Think like a majority, and simply eliminate Section 8(a)(2) and all the case law construing it.

Any workplace structure, employer created or not, that empowers individual employees ought not to be impeded. If a company’s support for genuine labor organizations is considered a real problem today, pass a new law. In fact, treat company support for labor unions like campaign contributions: Require companies to file public disclosure forms on a quarterly basis regarding financial and other assistance to unions and deliver copies to all employees. After all, just because lobbyists make campaign contributions to politicians doesn’t mean they own them. Upon reflection, maybe that isn’t the best analogy. Still, you get the picture: Eliminate

8(a)(2). You can waste time in 1996 holding hearings on whether company-dominated unions are still a problem requiring federal legislation today.

Reform #3: Require all employment disputes involving federal law to be handled by neutral third-party arbitration under the Federal Arbitration Act.

The third reform is potentially the most far reaching. Delays in processing discrimination charges by the NLRB and the Equal Employment Opportunity Commission are of near-legendary proportions. The Department of Labor isn't much better. Don't believe these agencies' cries for more employees to help with the backlog. Cut their staffs to caretaker level. Strip state and federal courts and administrative law judges of their jurisdiction to hear employment-related charges under any federal statute regulating employer-employee relations: the National Labor Relations Act and anti-union discrimination; Title VII of the Civil Rights Act, which prohibits race, sex, and natural origin discrimination; age discrimination under the Age Discrimination in Employment Act; handicap discrimination under the Americans with Disabilities Act; the Wage and Hour Law; the Family Medical Leave Act; virtually anything involving employment you can conceive of, with the exception of actions against pension and benefit plan fiduciaries under the Employee Retirement Income Security Act.

Instead, require all individual employment disputes under federal law to be subject to final and binding arbitration. Unless a company has already established a final and binding grievance or arbitration procedure for its own employees, arbitration will proceed according to rules established by the American Arbitration Association with arbitrators appointed by it, the Federal Mediation and Conciliation Service, or agreed to by the parties. Arbitrators would have authority to give injunctive relief as well as damages, including punitive damages. Decisions of arbitrators could be appealed only pursuant to the provisions of the Federal Arbitration Act, which largely limits appeals to fraud or misconduct by arbitrators and not to factual or legal mistakes. Or, if that seems too scary, give federal courts the authority to overturn obvious legal or factual errors made by arbitrators.

To encourage more companies to establish final and binding arbitration procedures for all employee disputes (including wrongful discharge, etc.) and not just those with respect to rights under federal law, *any* final and binding arbitration procedure recognized by federal courts under the Federal Arbitration Act would be permitted. This would encourage more companies to establish "peer review procedures" where final and binding decisions on employment disputes are rendered by panels of fellow employees who volunteer for the purpose. Employee peer review is a growing phenomenon among companies. Those who have it swear by it. Fellow employees are more sensitive to, and can be a better check on, arbitrary managers than third-party arbitrators with little or no appreciation of workplace realities. The same is true when dealing with fellow employees. They don't tolerate substandard job performance. Peer review panelists tend to apply to the conduct of fellow employees the same high standards they apply to themselves.

What about the legions of government employees, mostly lawyers, who enforce these federal laws—the General Counsel's Office of the National Labor Relations Board, the National Labor Relations Board's Administrative Law Judges, the EEOC, the Department of Labor, etc.? To paraphrase a recent campaign slogan: Give them severance pay and send them home to find honest work.

Encourage these arbitrations to proceed *without* lawyers. If both sides choose to proceed with a lawyer, make the loser pay the winner's attorney's fees *and* the entire fee of the arbitrator. If only one side has a lawyer and it loses, make it pay the entire fee of the arbitrator. If neither side has a lawyer, each pays its own costs and the arbitrator's fee is split 50-50.

Above all, keep first principles in mind when enacting these reforms. People are our most precious resource—empower them, not bureaucrats or unions. Reward companies which recognize this and treat their employees fairly.

Contributing Editor Michael McMenamin is an employment lawyer in Cleveland.

(POLITICS, EMPLOYMENT)